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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2008 OAL DETERMINATION NO. 12
(OAL FILE # CTU 2007-1203-02)

REQUESTED BY: Randy D. Roxson

CONCERNING: Office of State Fire Marshal, Certification Fees for CFSTES
and FSTEP

DETERMINATION ISSUED PURSUANT TO
GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On December 3, 2007, Mr. Roxson (Petitioner) submitted a petition to OAL challenging the increase in fees for the California Fire Service Training and Education System (CFSTES) and Fire Service Training and Education Program (FSTEP). The fee increases were imposed by the Office of the State Fire Marshal (OSFM) in a document titled "Notice of Postponement of Fee Increase (Correction to original notice released May 2007)" in which the previously noticed fee increase was postponed until January 1, 2008. The Petitioner challenges this fee increase as an alleged underground regulation¹ issued

¹ An underground regulation is defined in title 1, California Code of Regulations, section 250: "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

in violation of Government Code section 11340.5.² In this Determination, we will not limit our discussion to the increase in fees, but rather will examine the fees themselves.

DETERMINATION

OAL determines that the fees for the CFSTES and FSTEP programs meet the definition of a "regulation" as defined in section 11342.600 and that they should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

In an undated memorandum titled "Notice of Postponement of Fee Increase (Correction to original notice released May 2007)" the OSFM notified the public that fees for two programs would be increased effective January 1, 2008. It is not clear from the documents submitted when the underlying fees were established.

OSFM did not submit a response to this petition. It did, however, publish a Notice of Proposed Action on January 29, 2008, in the California Regulatory Notice Register, in which OSFM proposes to adopt the fees as regulations. After receiving public comments on the proposed regulatory text, OSFM made changes to the text pursuant to a 15-day notice as required by section 11346.8. The new notice was sent to all commenters on June 5, 2008, and the comment period will close on June 20, 2008.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states as follows:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in

² Unless otherwise specified code references are to the California Government Code.

section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

ANALYSIS

A determination of whether the challenged rule is a “regulation” subject to the APA depends on (1) whether the challenged rule contains a “regulation” within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 as:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. The fees apply to all fire department personnel who take the courses and exams. As *Tidewater* pointed out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. The fees apply to such a clearly defined class of persons – fire department personnel. The first element is, therefore, met.

The second element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. The CFSTES and FSTEP programs are established pursuant to the California Fire Service Training and

Education Program Act.³ Pursuant to Health and Safety Code section 13156, the purposes of the Act are:

- (a) To reduce the costs in suffering and property loss resulting from fire through standardized fire training and education programs.
- (b) To provide professional fire service training and education programs to personnel in fire departments that rely extensively on volunteers.
- (c) To develop new methods and practices in the area of fire protection.
- (d) To disseminate information relative to fires, techniques of firefighters, and other related subjects to all interested agencies and individuals throughout the state.
- (e) To enhance the coordination of fire service training and education.
- (f) To develop a coordinated and standardized plan for the control of fires and the safety of firefighters where hazardous materials are involved.

Health and Safety Code section 13157 states that to achieve the goals of the Act, the OSFM is required to:

- (a) Promulgate and adopt rules and regulations necessary for implementation of the program.
- (b) Establish the courses of study and curriculum to be used in the program.
- (c) Establish prerequisites for the admission of personnel who attend courses offered in the program.
- (d) *Establish and collect admission fees and other fees that may be necessary to be charged for seminars, conferences, and specialized training given, which shall not be deducted from state appropriations for the purposes of this program.*
- (e) *Collect such fees as may be established pursuant to subdivision (d) of Section 13142.4.*⁴ (Emphasis added.)

Health and Safety Code section 13159.8 (renumbered from 13142.4) states:

The State Fire Marshal, with policy guidance and advice from the State Board of Fire Services, shall:

- (a) Establish and validate recommended minimum standards for fire protection personnel and fire protection instructors at all career levels.
- (b) Develop course curricula for arson, fire technology, and apprenticeship training for use in academies, colleges, and other educational institutions.

³ Health and Safety Code section 13155 and following.

⁴ Health and Safety Code section 13142.4 was renumbered in 1988 to section 13159.8. This reference has not been updated in the text of section 13157.

(c) Develop, validate, update, copyright, and maintain security over a complete series of promotional examinations based on the minimum standards established pursuant to subdivision (a).

(d) Have the authority to make the examinations developed pursuant to subdivision (c) available to any agency of the state, to any political subdivision within the state, or to any other testing organization, as he or she deems appropriate.

(e) *Establish any fees which are necessary to implement this section.* However, the State Fire Marshal shall not establish or collect any fees for training classes provided by the State Fire Marshal to fire protection personnel relating to state laws and regulation which local fire services are authorized or required to enforce.⁵

(f) Promote, sponsor, and administer the California Fire Academy System.

(g) Establish procedures for seeking, accepting, and administering gifts and grants for use in implementing the intents and purposes of the California Fire and Arson Training Act.

(h) The recommended minimum standards established pursuant to subdivision (a) shall not apply to any agency of the state or any agency of any political subdivision within the state unless that agency elects to be subject to these standards. (Emphasis added.)

The CFSTES and FSTEP programs are part of the State Fire Marshal's mandate to provide educational programs for fire department personnel, and to adopt fees for those programs. The fees for the programs, therefore, implement, interpret or make specific the California Fire Service Training and Education Program Act. The second element in *Tidewater* is therefore met.

The fees for the CFSTES and FSTEP programs, therefore, meet the definition of a "regulation" as defined in section 11342.600.

The final issue to examine is whether the fee imposed by OSFM falls within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.⁶ Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

⁵ We note that the fees challenged as underground regulations are for voluntary programs, and are not prohibited by Health and Safety Code section 13159.8(e) "relating to state laws and regulation which local fire services are authorized or required to enforce."

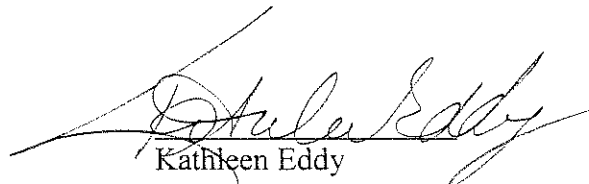
⁶ See Government Code section 11340.9.

We find no APA exemptions that would apply to these fees.⁷ OSFM has not identified any express exemption from the APA that would include the fees challenged in this petition.


CONCLUSION

The fees detailed in "Notice of Postponement of Fee Increase (Correction to original notice released May 2007)" issued by OSFM meet the definition of a "regulation" as defined in section 11342.600. They do not fall within any express APA exemption, and should, therefore, have been adopted pursuant to the APA.

Date: June 16, 2008



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⁷ A rule requiring the payment of fees or increasing the amount of fees does not fall within the "rate, price or tariff" exemption of Government Code section 11340.9(g). See e.g. *California State Advertising Association, Inc v. State of California, Department of Transportation*, (2006), Not Reported in F.Supp.2d, 2006 WL 662747 (E.D.Cal.)